Air Climate Systems, Inc. and All Climate Systems, Inc. *and* Sheet Metal Workers Local 18. Case 30–CA–17695

May 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

The General Counsel seeks a default judgment on the ground that the Respondents failed to file a timely answer to the complaint. Upon a charge filed by the Union on March 12, 2007, the General Counsel issued a complaint on August 31, 2007 against Air Climate Systems, Inc. and All Climate Systems, Inc., the Respondents, alleging that they were alter egos and that they violated Section 8(a)(5) and (1) of the Act. On September 27, 2007, the Respondents filed a late answer.

On October 4, 2007, the General Counsel filed a Motion for Default Judgment with the Board. On October 11, 2007, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On October 15, 2007, the Respondents filed a response to the default judgment motion, and on October 25, 2007, the General Counsel filed a statement in support of the default judgment motion.

On February 8, 2008, the Board issued an Order giving the Respondents an opportunity to file a response explaining the late filing of the answer. On February 27, 2008, the Respondents filed a late response to the Order. On March 7, 2008, the General Counsel filed a reply to the Respondents' response.

Ruling on the Respondents' Response to the Board's February 8, 2008 Order[1]

The Respondents' response to the Board's February 8, 2008 Order was due on February 22, 2008. The Respondents' response was filed by mail, was postmarked on February 22, 2008, and was received by the Board on February 27, 2008. Section 102.111(b) of the Board's Rules and Regulations provides that a document must be received by the Board on or before the due date and that documents filed by mail must be postmarked on or before the day before the due date. The Respondents' response was not received by the Board until 5 days after the due date and was postmarked on the due date. Accordingly, the Respondents' response was filed late.

Section 102.111(c) provides that a document may be filed late only upon good cause shown based on excusable neglect. It also requires that a party seeking permission to file a document late must file a motion with the late document setting forth the grounds relied on for the late filing. The Respondents offer no explanation for the late filing of the response and did not file the required motion seeking permission to file the response late.

We therefore reject the Respondents' late-filed response.[2]

Ruling on the Motion for Default Judgment

Section 102.20 provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint unless good cause is shown to the contrary. The complaint here was served on August 31, 2007. The Respondents' answer was therefore due on September 14, 2007. In addition, the complaint stated that the answer had to be received by the Regional Office by September 14, 2007, or postmarked by September 13, 2007, and that, if no answer were filed, the Board could find the complaint allegations to be true pursuant to a default judgment motion. When the Respondents did not file an answer by the September 14, 2007 due date, the Region, by letter dated September 19, 2007, notified the Respondents that they had failed to file an answer within the prescribed time and that, unless an answer was received by September 26, 2007, a motion for default judgment would be filed.

The Respondents did not file an answer by September 26, 2007, but instead faxed an answer to the Regional Office after close of business on September 26, 2007, and mailed the answer on September 26, 2007. The answer was postmarked on September 26, 2007, and received in the Regional Office on the next day, September 27, 2007.

In their response to the default judgment motion, the Respondents concede that they filed the answer 1 day late and offer no explanation for the late filing. Absent a showing that the late filing of an answer is attributable to excusable neglect, the Board will reject the late answer, will find the complaint allegations to be admitted, and will grant default judgment on that basis. See *Proper*

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] As explained below, even if we accepted the Respondents' late-filed response, we would find that the explanation in the response does not demonstrate good cause excusing the late filing of the answer.

Steel Erectors, Inc., 345 NLRB 906, 907 (2005), and cases cited therein.

As noted above, we have rejected as late filed the Respondents' February 22, 2008 response. However, even if the response had been timely filed, the Respondents' explanation for the late filing of the answer does not demonstrate good cause based on excusable neglect.

In their response, the Respondents explain the late filing of the answer by stating that their counsel attended a hearing on the day the answer was due, that the hearing ran later than expected, that this delayed counsel's return to his office, and that this delay prevented counsel from hand-filing the answer in the Regional Office that afternoon.[3]

We find the Respondents' explanation unavailing. Counsel knew the answer had to be filed in the Regional Office by close of business that day. He nevertheless attended a hearing that he anticipated would run through 2:30 p.m. at a location 45 miles from his office. Counsel should have known that unexpected delays—e.g., the hearing running late or traffic congestion—might prevent him from returning to his office in time to hand-file the answer before the Regional Office closed at 4:30 p.m. The Respondents have not explained why, in these circumstances, their counsel did not take alternative steps to ensure a timely filing, such as completing and mailing the answer prior to the due date or arranging in advance for a colleague to complete and hand-file the answer on September 26, 2007.[4]

Further, the Respondents do not explain why their counsel took no steps to have the answer filed when he realized he would return to the office later than anticipated. The hearing ended at about 3:30 p.m.[5] At that point, counsel had only 1 hour to drive the 45 miles to his office and hand-file the answer before the Regional Office closed. The Respondents state that the answer was "physically completed" by 3:00 p.m., but they do not explain why counsel could not have telephoned his office when the hearing ended at 3:30 p.m. and arranged for a colleague to sign, copy, and hand-file the answer before 4:30 p.m.

The Board has consistently rejected counsel inattention as an excuse for the late filing of an answer. See, e.g., *King Courier*, 344 NLRB 485 (2005); *South Atlantic Trucking, Inc*., 327 NLRB 534, 534–535 (1999). In these circumstances, we find that the Respondents' failure to timely file the answer was due to the inattention of their counsel and, as such, does not demonstrate good cause excusing the late filing.

We also note additional facts suggesting a disregard by the Respondents for the Board's rules and procedures. The Respondents' counsel knew he was filing the answer late, but did not file a motion for leave to file a late answer as required by Section 102.111(c). Although the Board's February 8, 2008 Order directed the Respondents to explain why the Respondents did not file such a motion, the Respondents' response to the Order failed to address this issue. Finally, as noted, the Respondents' response to the Board's February 8, 2008 Order was itself filed 1 day late and that too was not accompanied by the required motion for leave to file late.

The Respondents contend that the Board, in ruling upon the default judgment motion, should consider additional factors—that is, whether the late filing resulted in prejudice and whether the answer, if credited, would constitute a meritorious defense to the complaint allegations. In support of this contention, the Respondents rely on court decisions giving weight to these additional factors in determining whether to grant default judgment in late-answer cases arising under the Federal Rules of Civil Procedure.[6] However, the Board has previously considered and rejected this contention. See *Patrician Assisted Living Facility*, 339 NLRB 1153, 1154–1155 (2003) ("there are important differences between federal civil litigation and Board administrative process"); *Country Lane Construction,* 339 NLRB 1321, 1322 (2003), enfd. mem. 95 Fed. Appx. 817 (6th Cir. 2004); *Ferndale Foods, Inc.*, 339 NLRB 1194, 1195 (2003).[7]

For these reasons, in the absence of good cause being shown for the Respondents' late filing of the answer, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

[3] Counsel's office is located approximately one-fifth of a mile from the Regional Office in downtown Milwaukee.

[4] The Respondents do not allege the existence of any special circumstances that would excuse counsel's failure to take such alternate steps to timely file the answer.

[5] The hearing was 45 miles from counsel's office; counsel states that he arrived at the office "shortly before 4:30 p.m."

[6] *Draper v. Coombs*, 792 F.2d 915, 924–925 (9th Cir. 1986); *Silva v. City of Madison*, 69 F.3d 1368, 1377 (7th Cir. 1995), cert. denied 517 U.S. 1121 (1996); *In re Worldwide Web Systems, Inc.*, 328 F.3d 1291, 1296 (11th Cir. 2003).

[7] Chairman Schaumber believes the Board should give weight to these additional factors. See his dissent in *Patrician Assisted Living Facility*, supra, 339 NLRB at 1156–1161. However, he recognizes that this view is not current Board law. In addition, he finds that these additional factors are outweighed in the instant case by the weakness of the Respondents' excuse for the late filing of the answer, and by the Respondents' late filing of its response to the Board's February 8, 2008 Order.

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent Air Climate Systems, Inc. and Respondent All Climate Systems, Inc., corporations with offices and places of business in Janesville, Wisconsin, have been engaged in the business of servicing, repairing, and installing heating and air conditioning and refrigeration systems in the construction industry.

During the 12-month period ending May 31, 2006, Respondent Air Climate, in conducting its business operations, provided services valued in excess of $50,000 for enterprises within the State of Wisconsin that are directly engaged in interstate commerce. During the 12-month period ending June 1, 2007, Respondent All Climate, in conducting its business operations, provided services valued in excess of $50,000 for enterprises within the State of Wisconsin that are directly engaged in interstate commerce. Additionally, during the 12-month period ending June 1, 2007, Respondent All Climate, in conducting its business operations, purchased and received goods valued in excess of $50,000 directly from points outside the State of Wisconsin and from other enterprises, located within the State of Wisconsin, each of which other enterprises had received the goods directly from points outside the State of Wisconsin.

At all material times, the Respondents have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and Sheet Metal Workers Local 18 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On or about May 5, 2006, the Respondents established All Climate as a disguised continuation of Air Climate. At all material times, Air Climate and All Climate have been affiliated business enterprises with common officers, ownership, shareholders, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities, law firm, accounting firm, phone number, fax number, insignia, customers, vendors, insurance policies, and personnel, and have provided services for each other. Based on these facts, Air Climate and All Climate are, and have been at all material times, alter egos and a single employer within the meaning of the Act.

The following employees of the Respondents constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees engaged in, but not limited to, (a) the manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous or nonferrous metal work and all other materials used including the setting of all equipment and all reinforcements in connection therewith, (b) all lagging over insulation and all duct lining, (c) testing and balancing of all air-handling equipment and duct work and serving of all equipment installed by sheet metal workers, (d) the preparation of all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches, and (e) all other work included in the jurisdictional claims of Sheet Metal Workers' International Association.

Since on or about December 1, 1998, the Union has been the designated exclusive bargaining representative of the unit employees. Commencing on or about that date, the Respondents recognized the Union as the exclusive bargaining representative of the unit employees. This recognition has been embodied in successive collective-bargaining agreements. At all times since on or about December 1, 1998, the Union has been the exclusive bargaining representative of the unit employees based on Section 9(a) of the Act.[8]

At all material times, the Janesville Signatory Contractors (the Association) has been an informal organization composed of construction industry employers that, inter alia, represents its employer members in negotiating and administering collective-bargaining agreements.

On or about June 1, 2004, the Union and the Association entered into a multiemployer collective-bargaining agreement effective from June 1, 2004 to May 31, 2006 (the 2004 Agreement). At all material times, Respondent Air Climate was bound to the terms and conditions of employment of the 2004 Agreement.

During summer 2006, the Union and the Association reached agreement on a successor to the 2004 Agreement, effective from June 1, 2006 through May 31, 2009 (the 2006 Agreement). In August 2006, the Union provided a copy of the 2006 Agreement to the Respondents. The Respondents failed and refused to sign the 2006 Agreement.

On or about June 1, 2006, the Respondents withdrew recognition of the Union as the exclusive bargaining representative of the unit employees. Since on or about that same date, and continuing, the Respondents have repudi-

[8] In view of our finding that the Union is the 9(a) representative of the unit employees, we find it unnecessary to reach the alternative complaint allegations asserting that the Respondents had recognized the Union as the exclusive bargaining representative of the unit employees pursuant to Sec. 8(f) of the Act.

ated and failed and refused to apply the terms of the 2004 Agreement and the 2006 Agreement.

On or about January 4, 2007, the Union requested, by letter, that the Respondents furnish the Union with information regarding the Respondents' alter ego status that is necessary for and relevant to the Union's performance of its duties as the exclusive bargaining representative of the unit employees. Since that date, the Respondents have failed and refused to furnish the Union with the information requested in the January 4, 2007 letter.

CONCLUSION OF LAW

By withdrawing recognition from the Union, by failing to sign the 2006 Agreement, by repudiating and failing to apply the 2004 and 2006 Agreements since on or about June 1, 2006, and by failing to provide information requested by the Union, the Respondents have failed and refused to bargain collectively and in good faith with the exclusive representative of their employees in violation of Section 8(a)(5) and (1) of the Act. The Respondents' unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist from those practices and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondents to recognize the Union as the exclusive bargaining representative of the unit employees and, on request, to bargain in good faith with the Union as the exclusive bargaining representative of the unit employees. We shall also order the Respondents to abide by the 2006 Agreement. Further, having found that the Respondents failed and refused to apply the terms and conditions of the 2004 and 2006 Agreements since on or about June 1, 2006, we shall order the Respondents to make unit employees whole for any wages and other benefits lost as a result of their failure to apply the Agreements, computed in accordance with *Ogle Protection Service* 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded* 283 NLRB 1173 (1987). In the event that the Agreements provide for contributions to pension and benefit funds, we shall order the Respondents to make whole the funds for any failure to make the contractually-required contributions, with any additional amounts due the funds to be computed in the manner set forth in *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). We shall order the Respondents to reimburse employees for any losses they may have suffered as a result of their failure to make the required contributions, in the manner prescribed in *Kraft Plumbing & Heating* 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, supra.[9] Finally, we shall order the Respondents to provide the Union with the information requested in the January 4, 2007 letter.

ORDER

The National Labor Relations Board orders that the Respondents, Air Climate, Inc. and All-Climate, Inc., alter egos and a single employer, Janesville, Wisconsin, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the Sheet Metal Workers Local 18 as the exclusive bargaining representative of employees in the following unit:

> All employees engaged in, but not limited to, (a) the manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous or nonferrous metal work and all other materials used including the setting of all equipment and all reinforcements in connection therewith, (b) all lagging over insulation and all duct lining, (c) testing and balancing of all air-handling equipment and duct work and serving of all equipment installed by sheet metal workers, (d) the preparation of all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches, and (e) all other work included in the jurisdictional claims of Sheet Metal Workers' International Association.

(b) Failing and refusing to apply the terms and conditions of the June 2006 to May 2009 collective-bargaining agreement with the Union.

(c) Refusing to provide the Union with information that is necessary and relevant to the performance of the Union's role as exclusive bargaining representative of the unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Recognize and, on request, bargain with the Union as the exclusive bargaining representative of the unit employees.

[9] The issue of when the respective terms of the 2004 Agreement and 2006 Agreement were applicable may be determined in compliance proceedings.

(b) Abide by the terms and conditions of the June 2006 to May 2009 collective-bargaining agreement with the Union.

(c) Make whole the unit employees and benefit funds for any losses they may have suffered as a result of the Respondents' failure to abide by the terms of the June 2004 to May 2006 and June 2006 to May 2009 collective-bargaining agreements with the Union, in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, provide the Union with the information requested by it in its January 4, 2007 letter to the Respondents.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at their facilities in Janesville, Wisconsin, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed any of the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at the closed facilities at any time after June 1, 2006.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. May 30, 2008

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with the Sheet Metal Workers Local 18 as the exclusive bargaining representative of employees in the following unit:

> All employees engaged in, but not limited to, (a) the manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous or nonferrous metal work and all other materials used including the setting of all equipment and all reinforcements in connection therewith, (b) all lagging over insulation and all duct lining, (c) testing and balancing of all air-handling equipment and duct work and serving of all equipment installed by sheet metal workers, (d) the preparation of all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches, and (e) all other work included in the jurisdictional claims of Sheet Metal Workers' International Association.

WE WILL NOT fail and refuse to apply the terms and conditions of the June 2006 to May 2009 collective-bargaining agreement with the Union.

WE WILL NOT refuse to provide the Union with information that is necessary and relevant to the performance

of the Union's role as exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive bargaining representative of the unit employees.

WE WILL abide by the terms and conditions of the June 2006 to May 2009 collective-bargaining agreement with the Union.

WE WILL make whole the unit employees and benefit funds for any losses they may have suffered as a result of our failure since on or about June 1, 2006 to abide by the terms of the June 2004 to May 2006 and May 2006 to June 2009 collective-bargaining agreements with the Union, with interest.

WE WILL provide the Union with the information relating to the relationship between Air Climate Systems, Inc. and All Climate Systems, Inc. as requested by the Union in its letter of January 4, 2007.

AIR CLIMATE SYSTEMS, INC. AND ALL CLIMATE SYSTEMS, INC.